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CASE NO. 87-843

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JULIUS FERRARI, ADMINISTRATOR OF THE ESTATE OF JOHN FERRARI,
Petitioner,

v.

WOODSIDE RECEIVING HOSPITAL, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a state condition the waiver of its eleventh amendment immunity upon the waiver of all claims which the plaintiff has against state officers or employees whose acts or omissions form the predicate for liability, where such latter waiver is voidable if the state court having jurisdiction over the claim against the state determines that the officers or employees acted manifestly outside the scope of their employment or in a reckless or malicious manner?

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STATEMENT OF THE CASE

John Ferrari was an in-patient at Youngstown, Ohio's Woodside Receiving Hospital ("Woodside") when he died on September 22, 1983. His death resulted from apparent complications of a blood clot that he sustained during his admission.

In late February 1984, Julius Ferrari commenced suit in the Ohio Court of Claims as the administrator of John Ferrari's estate. Through that action, Julius Ferrari sought to recover $3,000,000.00 for the death of his son. He named as defendants Woodside, two of its physician-employees — Drs. Muhammad Khan and Gust Boulis, and the Ohio Department of Mental Health ("Department"), the state agency which operated Woodside. Ferrari accused this quartet collectively of having . . .

> . . . negligently and carelessly failed to provide the Deceased JOHN FERRARI with adequate care, supervision and treatment of the blood clot; negligently failed to transfer the Deceased JOHN FERRARI to a local hospital for medical treatment; failed to exercise ordinary care commensurate with local standards in the treatment of a diagnosed blood clot; negligently failed to reasonably check the condition of the Decedent's blood clot; and negligently and carelessly failed to perform the various diagnostic tests in an effort to determine the seriousness and whereabouts of the blood clot.

The Court of Claims dismissed Drs. Khan and Boulis from that action because Ohio Rev. Code Ann. §2743.02(E) (Anderson 1981) provides that the State is the only defendant in original actions in the Court of Claims. Subsequently, in April 1984, Ferrari filed suit against Khan and Boulis in the Ohio Court of Common Pleas for Mahoning County. Despite couching his allegations in terms of "wantonness" and "recklessness" Ferrari continued to ascribe to Khan and Boulis the same misconduct that he ascribed to them in the Court of Claims complaint.

On August 23, 1984, the Court of Common Pleas entered an interlocutory order dismissing the action for want of subject matter jurisdiction. Six days later, Ferrari instituted the instant action in the Northern District of Ohio under 42 U.S.C. §1983. Claiming that his son's fourth, fifth and fourteenth amendment rights had been violated, Ferrari sought $3,000,000.00 in damages from Drs. Khan and Boulis, as well as from Woodside and the Department. In paragraph 11 of his complaint, Ferrari declared that . . .

> . . . the defendants, individually and in concert, negligently and carelessly failed to provide the Deceased JOHN FERRARI with adequate care, supervision and treatment of the blood clot; negligently failed to transfer the Deceased JOHN FERRARI to a local hospital for medical treatment; failed to exercise ordinary care commensurate with local standards in the treatment of a diagnosed blood clot; negligently failed to reasonably check the condition of the Deceased's blood clot; and negligently and carelessly failed to perform the various diagnostic tests in an effort to determine the seriousness and whereabouts of the blood clot.

When the defendants responded with a motion to dismiss, Ferrari replied with an amended complaint. Recognizing that the eleventh amendment barred his claims against Woodside and the Department, Ferrari did not name them as defendants in the amended complaint. Instead, he named only Drs. Khan and Boulis, and John Doe, Woodside's alleged administrator.

In the amended complaint, Ferrari eliminated the asserted fourth and fifth amendment bases of his §1983 claim. He also altered his fourteenth amendment due process claim when he withdrew the specific allegations of medical misconduct that appeared in his three previous pleadings and inserted in their place the nonfactual allegation that "defendants Khan and Boulis substantially deviated from the acceptable standard of medical care in the treatment of the decedent which proximately resulted in decedent's death on September 22, 1983."

Khan and Boulis responded with another motion to dismiss in which they posited several bases for dismissal. At the outset they argued that, by having voluntarily chosen to prosecute a medical malpractice/wrongful death action against the State in the Ohio Court of Claims, Ferrari waived the instant action against Khan and Boulis. This, they claimed, caused Ferrari to lack standing to sue under §1983. Khan and Boulis further argued that, if Ferrari's actions did not deprive the district court of jurisdiction, dismissal was warranted under *Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1983), because, notwithstanding the inclusion in the amended complaint of the ambiguous phrase "substantially deviated from acceptable standards of acceptable care," the specific allegations in the original complaint of medical misconduct revealed the §1983 claim to be grounded solely in negligence.

Ferrari responded with a brief in opposition to which Khan and Boulis replied. Subsequently, the district court held a hearing on the motion and, on December 18, 1985, issued its decision. The district court granted the motion, summarizing its reasoning thusly:

> In this action, the plaintiff voluntarily chose to bring an action in the Ohio Court of Claims against the state. The plaintiff has no legal right to sue a sovereign entity such as Ohio absent the state's waiver of immunity in section 2743.02(A). This voluntary act on behalf of the plaintiff of choosing to sue the State of Ohio, as a matter of law, demonstrates an acquiescence by the plaintiff to proceed within the provision of section 2743.02(A) and waive any cause of action that may be brought individually in this court against the employees of the state based factually on the same acts or omissions alleged in the Court of Claims suit. For this reason, this court must conclude that the plaintiff voluntarily waived any right to bring an action against the individual physicians for alleged constitutional violations, given the circumstance that plaintiff elected to sue the State of Ohio under

> the limitations and conditions imposed by the state legislature in its limited waiver of sovereign immunity and consent to be sued in the Court of Claims.

624 F. Supp. 899, 903 (N.D. Ohio 1985).

Although it terminated the action the next day with an order under Rule 58, Fed. R. Civ. P., the district court declared:

> . . . In the event it should be determined, at some later point in the proceedings in the Court of Claims that the actions of the individual defendants Khan and Boulis were 'manifestly outside the scope of the officer's or employee's office or employment, or that the officer or employee acted with malicious purpose or bad faith or in a wanton or reckless manner' the claim now before this court may be reinstated here. . . .

624 F. Supp. at 903.

From this decision and entry of dismissal, Ferrari perfected an appeal to the United States Court of Appeals for the Sixth Circuit. Although the court affirmed "on the basis of Judge Bell's opinion," it stated: "This issue is controlled by the recent *en banc* case of *Leaman v. Ohio Department of Mental Retardation and Developmental Disabilities*, No. 85-3471 (6th Cir. 1987); . . . " (A2).

SUMMARY OF THE ARGUMENT

Ohio Rev. Code Ann. §2743.02(A) (Anderson 1981 & Supp. 1987) provides that the "filing of a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee." It does not penalize anyone who prosecutes a claim in federal court under 42 U.S.C. §1983. It does not forbid the filing of any §1983 action. Therefore, it does not restrict the power of federal courts to decide actions brought under §1983 against officers or employees of the state of Ohio.

Not only does §2743.02(A) not divest federal courts of jurisdiction over §1983 actions, it does not extract an unconstitutional waiver of such actions. The benefits of proceeding against the state of Ohio in its Court of Claims include a pocket deeper than that of the individual officer or employee, and a standard of culpability lower than that of a §1983 action. Those benefits are no less obvious than those offered to a criminal defendant to release a potential §1983 action in exchange for a dismissal of criminal charges. Nor is the election to proceed in the Court of Claims less rational than that to exchange a potential civil action for freedom from criminal prosecution. Therefore, one who proceeds in the Court of Claims voluntarily waives any §1983 action against a state officer or employee that is based on the same act or omission which serves as the predicate for the State's liability.

Since the decision to bring a §1983 action has been confided in the injured individual, and not in the public at large, the public interests of the vindication of constitutional rights and exposure of official misconduct are not contravened when that individual voluntarily proceeds in the Court of Claims against the state of Ohio. Moreover, the public interest of protecting state officers and employees from the burdens of defending unjust §1983 actions is furthered by the waiver provision of §2743.02(A).

Consequently, that provision is constitutional, and no reason exists to grant the petition for a writ of certiorari to the Sixth Circuit.

REASONS FOR DENYING THE WRIT

I. OHIO REV. CODE §2743.02(A)'S WAIVER PROVISION DOES NOT DIVEST FEDERAL COURTS OF JURISDICTION OVER CLAIMS PROSECUTED UNDER 42 U.S.C. §1983.

A state statute that penalizes or punishes one who has availed himself of access to the federal courts is unconstitutional. *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318 (1914); *accord, Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922). Similarly, a state statute which prohibits an otherwise valid claim from being filed in federal court contravenes the Constitution. *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961). Thus, states may not statutorily limit a prospective plaintiff's choice of forum, except in special circumstances. *Hayes Industries, Inc. v. Carribean Sales Ass'n*, 387 F.2d 498 (1st Cir. 1968).

With these principles, respondents do not take exception. Nor did the majority of the United States Court of Appeals for the Sixth Circuit take exception. It was with Petitioner's assertion that Ohio Rev. Code §2743.02(A) contravened those principles that respondents and the *en banc* majority in *Leaman v. Ohio Dept. of Mental Retardation and Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987), upon which the panel below relied, disagreed.

Section 2743.02 provides:

> (A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in

> the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.
>
> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.
>
> (2) In any circumstance in which a claimant proves in the court of claims that an officer or employee, as defined in division (A) of section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions. . . .

Id., as amended, eff. 10-20-87.

On its face, §2743.02(A) does not impose a penalty upon anyone who would proceed directly to federal district court to prosecute a claim under 42 U.S.C. §1983. Nor does it forbid that same person from proceeding to federal district court to prosecute the same claim after he has commenced an action in the Ohio Court of Claims. Indeed, rather than

limiting a prospective plaintiff's choice of forum, it increases it.[1] Thus, §2743.02 in no way restricts the power of federal courts to decide actions prosecuted under §1983 against officials or employees of the state of Ohio.

The power to decide, however, includes the power to dismiss. And, the power to dismiss includes the power to do so because an otherwise valid claim is proved to have been waived. *See Home Insurance Co. v. Morse,* 87 U.S. (20 Wall.) 445, 451 (1874) ("[A]ny citizen may no doubt waive the rights to which he may be entitled."). Assuming, arguendo, §2743.02 is unconstitutional, it is not because it divests the federal courts of jurisdiction, but rather because it extracts an unconstitutional waiver of the plaintiff's §1983 claims.

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[1] As amended, effective October 20, 1987, newly-created subdivision (F) of §2743.02 provides:

> (F) A civil action against a state officer or employee that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to civil immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.
>
> The filing of a claim against a state officer or employee under this section tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to civil immunity under section 9.86 of the Revised Code.

The references to Ohio Rev. Code §9.86 and the courts of common pleas evidence the fact that subdivision (F) applies only to claims of state law, not to federal claims. Indeed, a contrary reading would cause the subdivision to run afoul of the principles enunciated in *Harrison, Terral, and Hayes,* and such a reading would violate the long-settled rule that, if a statute is susceptible of one interpretation that is constitutional and a second that is unconstitutional, courts must select the former interpretation. *See Califano v. Yamasaki,* 442 U.S. 682 (1979).

II. OHIO REV. CODE §2743.02(A)'S WAIVER PROVISION DOES NOT CONTRAVENE THE PUBLIC INTERESTS UNDERLYING 42 U.S.C. §1983.

In *Leaman,* Judge Nelson discussed at length this Court's decision in *Town of Newton v. Rumery,* 480 U.S. ____, 94 L. Ed. 2d 405 (1987). By contrast, petitioner fails to acknowledge much less address *Rumery,* which controls the resolution of the instant action. In that case, this Court held that an agreement to release a criminal defendant's right to prosecute a §1983 action in exchange for the dismissal of criminal charges against him was enforceable. Consequently, dismissal of the subsequent §1983 action brought by the defendant was in order.

Writing for the Court, Justice Powell rejected the concept that the release-dismissal agreement signed by Mr. Rumery was not inherently coercive. 94 L. Ed. 2d at 416. It reflected "a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 417. Additionally, the agreement was not the byproduct of undue influence or duress. "Rumery is a sophisticated businessman," Justice Powell observed. "He was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement. [Further,] Rumery considered the agreement for three days before signing it." *Id.* Thus, concluded Justice Powell, "Rumery voluntarily waived his right to sue under §1983." *Id.*

In the instant case, Petitioner was under no pressure to waive his §1983 action. The state of Ohio did not have the axe of criminal prosecution hanging over his head. It did not limit to days the period within which he had to decide to waive his §1983 claim. Rather, the State merely provided a mechanism whereby Petitioner, with the advice of counsel, could choose to proceed against its deeper pocket on a claim of medical malpractice rather than against the limited personal pockets of Drs. Khan and Boulis on a claim of deliberate, bad faith conduct. "[T]he benefits offered in the

Ohio Court of Claims Act being no less 'obvious' than those offered Mr. Rumery and [Petitioner's] election to accept Ohio's offer being no less 'rational' than the election made by Mr. Rumery," *Leaman,* 825 F.2d at 954, the decision to dismiss Petitioner's claim was correct.

But, Ferrari complains that enforcement of §2743.02(A)'s waiver provision would contravene the public interest. Petitioner misapprehends that interest. As Justice Powell noted in Rumery, "Congress has confided the decision to bring [§1983] actions to the injured individuals, not to the public at large." 94 L. Ed. 2d at 417. Thus, Petitioner was the possessor of the power to make the decision to prosecute or not to prosecute his §1983 claim. Having elected the latter course, Petitioner cannot now seek "to elevate more diffused public interests about [his] considered decision that he would benefit personally from [an action in the Ohio Court of Claims"]. *Id.*

Moreover, as Justice Powell observed, "The vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by §1983 suits. . . . [T]he burden of defending such lawsuits is substantial. . . . [A]greements [that] protect public officials from [those] burdens . . . further [an] important public interest." *Id.* at 418. Although §2743.02(A) does not necessarily eliminate the inevitable expense of defending even unjust claims, it does furnish the state official or employee with the peace of mind that comes with exemption from personal liability. Thus, the waiver provision of that statute furthers an important public interest.

CONCLUSION

If a person is injured by the deliberate act or omission of an officer or employee of the state of Ohio he need not file an action in the Ohio Court of Claims before filing a §1983 action in federal court. Indeed, the filing of the Court of Claims action, under that circumstance, would be a waste of time, money, and effort because the State would not be liable for the bad faith actions of its employees. *See Drain*

v. Kosydar, 54 Ohio St. 2d 49, 56 n.6, 374 N.E.2d 1253, 1257 (1978).

If that same person is injured by the negligent act or omission of an Ohio state officer or employee, he is advised to file suit in the Court of Claims, rather than federal court, because negligence will not support a §1983 due process claim.

If, however, the injured person is unsure of the officer's or employee's level of culpability, he must make an election of remedies. Unlike a normal election of remedies, however, this is one election in which the injured person cannot lose, assuming he has a viable claim. He may proceed either to file a claim in federal district court or in the Court of Claims. If he chooses the former route and loses because the level of culpability does not rise to a deprivation, the resultant dismissal likely may be with prejudice. On the other hand, if he pursues the Court of Claims action and the State successfully defends on the ground that the officer or employee acted in bad faith, then the injured person can pursue his §1983 claim. Any other resolution of the Court of Claims action brings the underlying dispute to an end.

In any event, the interests of all parties are protected. Assuming he was wrongfully injured by the non-deliberate act or omission of a state officer or employee, the plaintiff would obtain a collectable judgment compensating him for his injuries. The officer or employee, in turn, would be spared possible financial ruin. Ironically, the only loser would be the State which, prior to the enactment of the Court of Claims Act, would not have been subject to suit in either federal or state court.

Assuming the wrongful injury was the result of deliberate or bad faith conduct, the State would not be liable under §1983 or §2743.02, whatever the theory of recovery. But the injured party could obtain a judgment against the individual officer or employee for both compensatory and punitive damages. The prospects for collecting that judgment, however, could well be bleak.

Given all these variables, it only makes sense to file an action in the Court of Claims when in doubt about the level of the culpability of the tortfeasor. This is what Petitioner did. He was not coerced to file his claim in the Court of Claims. Indeed, he may well recover compensation in that court. To allow him now the opportunity to recover a second judgment of compensation in the federal court would unjustly enrich him, run counter to the underlying bases of §1983 liability, and penalize the State for waiving its eleventh amendment immunity. The Sixth Circuit correctly rebuffed his attempt to secure two bites of the apple.

Ohio Rev. Code §2743.02 is clear and unambiguous. It sensibly balances the interests of persons injured at the hands of Ohio state officers and employees, while securing to those officers and employees the freedom to perform their jobs, even if injuries result. While defining the scope of Ohio's limited waiver of its eleventh amendment immunity, §2743.02 does not divest federal courts of jurisdiction over §1983 actions. Nor does §2743.02 preclude an injured person from going directly to federal court under §1983. Therefore, by no stretch of the imagination can it be concluded that the waiver provision of §2743.02 is unconstitutional, unenforceable, or enforceable only as to nonfederal claims.

WHEREFORE, for the foregoing reasons, respondents Khan and Boulis respectfully urge this Court to deny the petition for a writ of certiorari to the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do certify that the requisite number of copies of the foregoing Brief In Opposition To Petition For Writ Of Certiorari were sent to John D. Liber, Esq. and Ellen Simon Sacks, Esq., attorneys for Petitioner, 1500 National City Bank Building, 629 Euclid Avenue, Cleveland, Ohio 44114, on this ____ day of April, 1988, by regular U.S. mail, postage prepaid.

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